Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 80-663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KELSEY-HAYES, INC.,

Petitioner,

vs.

ROY HOPKINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioner's first question presented for review is properly stated.

2. Petitioner's phrasing of its second question for review incorrectly implies that there is a "penalty" assessed against defendant under New Jersey Law, and that New Jersey law will also allow plaintiffs to pursue claims which will always be "stale." The question presented for review would be more fairly stated as follows:

> Whether the resultant pressure upon corporations throughout this country, engaged solely in interstate commerce, to register to do business in New Jersey constitutes an impermissible infringement upon interstate commerce in violation of the Commerce Clause of the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

Petitioner has correctly identified the parties to the proceedings in the Court of Appeals. However, a directly related case involving the same questions for review is now on appeal to the Supreme Court of the United States from a decision of the Supreme Court of New Jersey. That case is identified in this court as *Maren Engineering Corp. v. Konstantin Velmohos,* No. 80-629.

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CITATIONS TO OPINIONS BELOW

Petitioner's citations to the opinions in the District Court and the Court of Appeals are correct.

The Opinion of the Supreme Court of New Jersey in a related case—presently on appeal before this Court under the caption of *Maren Engineering Corp. v. Konstantin Velmohos*, No. 80-629—is reported *sub nom. Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980).

REASONS WHY THE WRIT SHOULD BE DENIED

Point I

No reason exists to grant *certiorari* to review the constitutionality of the classification created by the New Jersey Tolling Statute, sustained by both the Third Circuit and New Jersey Supreme Court since neither a fundamental interest nor conflicting decisions are involved and review would only affect parties to suits in a small minority of states.

The first question presented by the petition is whether the classification drawn by the New Jersey tolling statute between foreign corporations having a registered agent for service of process in the state and unregistered foreign corporations, the latter being precluded from asserting the defense of the statute of limitations in suits brought in New Jersey courts, "lacks a rational basis" and therefore violates the petitioner's right to due process and equal protection. This question is not sufficiently important to warrant an exercise of the Court's discretionary review for several reasons.

First, as the petitioner conceded below, the availability of the defense of the statute of limitations is not a fundamental right or privilege. This Court has so held in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), which *reaffirmed* the holding of *Campbell v. Holt*, 115 U.S. 620 (1885), that a repeal of the statute of limitations reviving a creditor's right of action on a debt does not deprive the debtor of property without due process. The Court, in an opinion by Justice Jackson, stated as follows:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They rep-

> resent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable *[sic]* and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. *Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual.* He may, of course, have the protection of the policy while it exists but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control. 325 U.S. at 314 (citations & footnote omitted; emphasis supplied).

Because no fundamental right is implicated, review of the statutory classification would not require strict scrutiny, *see Scherling v. Superior Court of Santa Clara County*, 22 Cal.3d 493, 149 Cal. Rptr. 597 (602-03 (1978)) (applying rational relationship standard or review in upholding statute tolling statute of limitations during criminal defendant's absence from state), but merely a determination of whether "any state of facts reasonably may be conceived to justify it." *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584 (1935).

Nor does New Jersey's denial of the defense of the statute of limitations to nonregistered foreign corporations even begin to "approach sensitive and fundamental personal rights" so as to trigger the application of the inter-

mediate or "middle-tier" level of scrutiny which has been utilized by the Court in cases involving discrimination based on gender or illegitimacy. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972) (illegitimacy); *see Craig v. Boren*, 429 U.S. 190, 210 (1976) (gender) (Powell, J., concurring). Thus, the applicable standard of review is not whether the statutory classification bears a "fair and substantial relation" to the stated object of the legislation, *Reed v. Reed*, 404 U.S. 71, 76 (1971) (gender discrimination), citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 416 (1920), but rather whether the classification bears some rational relationship to legitimate state purpose. *Weber, supra*, 406 U.S. at 172; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

Moreover, the Third Circuit correctly decided that the classification drawn by the New Jersey tolling statute between registered and nonregistered foreign corporations rationally furthers at least two legitimate state purposes. First, because an out-of-state corporation which has a local registered agent is much easier to identify and locate than an unregistered foreign corporation, the New Jersey legislature could have reasonably concluded that tolling the statute of limitations in favor of plaintiffs suing unregistered corporations in New Jersey courts was necessary in order to give such plaintiffs additional time to identify and locate their defendants. Also, the New Jersey Court Rules make a real and substantial distinction between service of process on a locally registered corporation and long-arm service by mail upon an unregistered out-of-state corporation. While service can be made under *New Jersey Court Rule* 4:4-4 (c)(1) upon a registered corporation "by serving . . . the person at the registered office of the corporation in charge thereof," long-arm service upon an unregistered foreign corporation requires that: (1) an attempt be made to serve the corporation within the state;

(2) an affidavit be filed by the plaintiff's attorney "that after diligent inquiry and effort personal service cannot be made" within the state; and (3) a showing be made that service by mail upon the corporation will be "consistent with due process of law." Because of these additional burdens upon a plaintiff seeking to obtain long-arm service upon an unregistered foreign corporation, the state legislature could have rationally concluded that tolling the statute of limitations in favor of such a plaintiff would give him the additional time needed to effect long-arm service and thereby eliminate the injustices due to time pressures that might otherwise result.

Although petitioner has repeatedly asserted that the New Jersey statute called into question here will allow a plaintiff an unlimited amount of time to delay institution of suit with accompanying prejudice to the defendant, the New Jersey Supreme Court has stated directly to the contrary, as follows:

> Contrary to defendants' and our Brother Sullivan's contentions, see *post* at (Slip op. at 1-2), the length of a defendant's exposure to suit without such an agent will not be determined solely by a plaintiff's convenience. If a plaintiff's delay is *inexcusable* and has resulted in *prejudice* to the defendant, the latter may raise the equitable defense of *laches* to bar the claim. (Citations omitted). *Velmohos v. Maren Engineering Corporation*, 83 N.J. 282, 416; A.2d 372 (1980) n.10.

A second reason for denying *certiorari* in this case is the fact that the Third Circuit's decision does not conflict with the decision of any other court of appeals or any state supreme court. The Third Circuit, in upholding the distinction made by the New Jersey tolling statute as

against equal protection and due process attack, expressly followed the New Jersey Supreme Court's decision on the exact same question in *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372, 379-81 (1980), *aff'd* 168 N.J. Super. 520, 403 A.2d 927, 930-32 (App. Div. 1979). Both the Third Circuit and New Jersey decisions are also in accord with the holdings and *dicta* in other courts of appeal and state high court decisions on similar issues. *See Zalatuka v. Metropolitan Life Insurance Co.*, 90 F.2d 230 (7th Cir. 1937) *(dicta)* (state legislature may distinguish between domestic and foreign insurance companies for purposes of determining time within which suits on insurance policies may be instituted or be forever barred); *Dew v. Appleberry*, 23 Cal. 3d 637, 153 Cal. Rptr. 219, 223 (1979) (statute tolling statutes of limitations which defendant absent from state did not penalize exercise of fundamental right and was rationally related to alleviating "any hardship that would result by compelling plaintiff to pursue defendant out of state"); *Vaughn v. Deitz*, 430 S.W.2d 487, 490 (Tex. 1968) (upholding statutes of limitations while defendant absent from state since distance of defendant from state may make it more expensive and difficult for plaintiff to locate defendant for purpose of effecting service or process by mail). Finally, this Court has upheld, against an equal protection attack, an Indiana statute which prohibited foreign casualty insurance companies from limiting by agreement to less than three years the time within which a suit could be brought against them on their indemnity policies while permitting domestic casualty insurance companies to contract for any reasonable limitation period. *Metropolitan Casualty Insurance Co. v. Brownell, supra*, 294 U.S. at 580-81.

Neither does the alleged fact that the unregistered foreign corporation in the particular case presented here was at all times readily amenable to service of process justify review. In *Clark v. Gulesian*, 429 F.2d 405 (1st

Cir. 1970), *cert. denied*, 400 U.S. 993 (1971), application of Maine decisions rejecting the adoption of the "discovery" rule barred the plaintiff from maintaining a medical malpractice action even though the plaintiff did not learn of the defendant doctor's negligence until a second operation in 1969 revealed that a towel had been left inside the plaintiff's body during initial surgical treatment in 1952. In holding that the Maine statute of limitations as interpreted and applied by the Maine decisions was not unconstitutional as a denial of due process or equal protection, the First Circuit emphasized that Maine's rejection of the discovery rules was a "policy decision" and reasoned as follows:

> Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of state claims, however free of fault the claimant's delay may be. 429 F.2d at 406. *Accord, Pittman v. United States*, 341 F.2d 739, 741 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965).

Similarly, New Jersey's decision to toll the statutes of limitations in suits against nonresident unregistered corporations was a policy decision and the fact that petitioner may not have contributed to any delay in the filing of the action in the case at bar does not preclude the state from reasonably concluding that plaintiffs in suits against unregistered foreign corporations should generally have the benefit of additional time in which to locate and effect service of process upon their defendants.

A final reason for refusing to grant *certiorari* is the fact that any decision by the Supreme Court in this case would not have nationwide impact but would only affect parties to suits in a handful of states. In order for the

Third Circuit to reach the constitutional issues presented here, the New Jersey Supreme Court in *Velmohos* had to construe *N.J.S.A.* §2A:14-22 as tolling the statutes of limitations in suits against an unregistered foreign corporation despite the corporation's amenability to long-arm service of process. 416 A.2d at 377-78. On this state question of statutory construction, New Jersey is clearly in a small minority.[1] *See, e.g., Cohn v. G.D. Searle & Co.*, 447 F. Supp. 903, 912-13 & n. 21 (D.N.J. 1978), *rev'd on other grounds*, 628 F.2d 801 (3d Cir. 1980) (counting 38 states as taking majority position and only four, including New Jersey, taking the minority position); *Daigle v. Leavitt*, 54 Misc. 2d 651, 283 N.Y.S.2d 328, 330-31 (Sup. Ct. 1967) (19 and 6); Note, 12 *Wake For. L. Rev.*, 1041, 1045 (1976) (29 and 6). Since the New Jersey legislature may well decide to join the majority by amending its tolling statute expressly to preclude tolling where an out-of-state defendant is amenable to service of process under the New Jersey long-arm rule, see, *e.g., Ill. Rev. Stat.* ch. 83, §19 (as amended 1973), it is not necessary for this Court to grant *certiorari* to review a decision of only local importance. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process . . . ." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

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1. In explaining its divergence from the majority rule, the New Jersey Supreme Court pointed to the fact that *N.J.S.A.* § 2A:14-22 is phrased in terms of representation within the state while the tolling statutes in majority-rule states are phrased in terms of "absence" from the state, "general language which more readily lends itself to flexible interpretation." *Velmohos, supra*, 416 A.2d at 377-78.

Point II

Since the New Jersey Tolling Statute as presently construed does not discriminate against interstate commerce and only incidentally burdens such commerce while serving valid local purposes, the Commerce Clause Question does not warrant the exercise of this Court's Discretionary Review.

The New Jersey tolling statute does not on its face or in practical operation necessarily discriminate against inter-state commerce, at least as presently construed by the New Jersey Courts. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). With respect to foreign corporate defendants in suits brought in New Jersey courts, statutes of limitations are tolled by *N.J.S.A.* §2A:14-22 under the following circumstances:

> [I]f [the foreign corporation] . . . is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues *or at any time before the expiration of the times so limited, the time or times during which such corporation . . . is not represented within this* state shall not be computed as part of the periods of time within which such an action is required to be commenced . . . (Emphasis supplied).

As the underlined language indicates, the tolling statute does not apply just in suits brought against foreign corporations which have been engaged solely in interstate commerce and have never been required to maintain an in-state agent for service of process. The tolling statute halts the running of statutes of limitation in suits against any foreign corporation that is engaged in intrastate and interstate commerce in New Jersey at the time a particular

cause of action accrues but which temporarily or permanently discontinues its intrastate business (and the accompanying maintenance of a local registered agent) before the applicable statute of limitation has run. While no New Jersey court has addressed the precise issue, several New Jersey courts have similarly held that tolling occurs under *N.J.S.A.* §2A:14-22 when an individual defendant who is a resident of New Jersey at the time the plaintiff's cause of action accrues, subsequently leaves the state before the applicable statute of limitations has run. *Guas v. Guas*, 146 N.J. Super. 541, 370 A.2d 91, 94-95 (Law Div. 1977); *Fidelity & Deposit Company of Maryland v. Abagnale*, 97 N.J. Super. 132, 234 A.2d 511, 518 (Law Div. 1967). Since tolling may therefore occur in an action against a foreign corporation arising out of either intrastate or interstate commerce, the statute does not discriminate on its fact against interstate commerce.

Moreover, while there is a split of authority on the issue, a New Jersey appellate court has held that a nonresident plaintiff such as the petitioner is entitled to the benefit of the tolling statute. *Govan v. Trade Bank & Trust Co.*, 109 N.J. Super. 271, 263 A.2d 146, 149 (App. Div. 1970). *Contra, Zelson v. Thomforde*, 428 F.2d 1360, 1362 (3d Cir. 1970);[2] *Leon v. Febbraro*, 165 N.J. Super. 205, 397 A.2d 1129, 1130 (Law Div. 1977). Thus, under current New Jersey law, there is no discriminatory impact on interstate commerce since under the *Goven* decision an unregistered foreign corporation as a plaintiff could obtain the same benefits from the tolling statute as a New Jersey resident or corporation.

Nor does the tolling statute in its practical operation discriminate against interstate commerce. This is not a

2. Although *Zelson* was decided a few months after the *Goven* decision, the Third Circuit in *Zelson* did not mention or discuss the New Jersey case in reaching its decision.

case where New Jersey has "overtly block[ed] the flow of interstate commerce at [the] State's borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). This is not a case where New Jersey has given its residents a preferred right of access over nonresidents to resources located within its borders. *Hughes v. Oklahoma, supra; Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). The petitioner has free and unrestricted access to New Jersey's markets and resources. Moreover, *N.J.S.A.* §2A:14-22 does not amount to a statute requiring a foreign corporation engaged in interstate commerce to register as a condition precedent to suit in New Jersey's courts. *Compare Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20 (1974). The statute does not penalize a foreign corporation for not maintaining a local registered agent in the state; it merely presents such a corporation with a tolled statute of limitations. *Cf. Dew v. Appleberry*, 23 Cal. 3d 637, 153 Cal. Rptr. 219, 223 (1979).

Finally, the burden placed on interstate commerce by the tolling statute is very slight when compared with the local benefits to be derived from its operation.

> Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Unregistered foreign corporations appearing as defendants, may be required to defend a few additional New Jersey lawsuits that would otherwise be banned by the applicable statute of limitations. Those corporations appearing as plaintiffs may be able to prosecute a few addi-

tional suits that would otherwise be banned. In any event, New Jersey obtains the benefit of protecting the plaintiffs who use its courts from the injustices that might otherwise result from the often burdensome and time-consuming tasks of identifying, locating and obtaining service of process upon unregistered out-of-state corporations. In light of the fact that the burden involved here is slight and under present New Jersey law there is no discrimination against interstate commerce, there is no reason to grant *certiorari* to review the statute in question under the commerce clause.

CONCLUSION

For the reasons set forth herein, respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari requested by petitioner.

Respectfully submitted,

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